

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THOMAS CAPPELLO : CIVIL ACTION  
:   
v. :   
:   
JAMES HEIDECKER, ESQ. : NO. 02-4518

M E M O R A N D U M

JOYNER, J. SEPTEMBER , 2002

Plaintiff, a prisoner, has filed a pro se 42 U.S.C. § 1983 civil rights complaint against his criminal defense attorney, alleging that he received ineffective representation in a criminal case.

With his complaint, plaintiff filed a request for leave to proceed in forma pauperis, which is hereby granted. However, plaintiff's complaint will be dismissed as legally frivolous, pursuant to 28 U.S.C. § 1915(e)(2)(B)(i), for the reasons which follow.

**I. DISCUSSION**

In order to bring suit under § 1983, plaintiff must allege that a person acting under color of state law deprived him of his constitutional rights. Kost v. Kozakiewicz, 1 F.3d 176, 184 (3d Cir. 1993) (listing elements of a § 1983 claim). The Supreme Court has determined that a defense attorney "does not act under color of state law when performing a lawyer's traditional functions as counsel in a criminal proceeding." See Polk County v. Dodson, 454 U.S. 312, 325 (1981) (footnote omitted). Since plaintiff's defense attorney does not act under color of state law, he may not be sued under § 1983. Plaintiff

may be dissatisfied with the representation he has been provided, however, the relief he seeks is not available to him in a civil rights action in this Court.

## **II. CONCLUSION**

Plaintiff has advanced an "indisputably meritless legal theory." Neitzke v. Williams, 490 U.S. 319, 327 (1989).

Accordingly, dismissal of this complaint pursuant to 28 U.S.C. § 1915(e)(2)(B)(i) is appropriate. An order dismissing this complaint follows.

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O R D E R

AND NOW, this                      day of September, 2002,  
IT IS ORDERED that:

1. Leave to proceed in forma pauperis is GRANTED.
2. This action is **DISMISSED AS FRIVOLOUS** pursuant to 28 U.S.C. § 1915(e)(2)(B)(i), for the reasons stated in the accompanying memorandum filed this day.

AND IT IS SO ORDERED.

BY THE COURT:

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J. CURTIS JOYNER, J.

